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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1162

FEDERAL POWER COMMISSION, *Petitioner*

v.

NEW ENGLAND POWER COMPANY, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1a-13a) is reported at 467 F.2d 425. The initial order (No. 427) of the Federal Power Commission (Pet. App., pp. 18a-50a) and its order denying rehearing

(Pet. App., pp. 51a-60a) are reported at 45 F.P.C. 440 and 45 F.P.C. 964, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (Pet. App., pp. 14a-15a), and the Commission's petition for rehearing was denied on September 25, 1972 (Pet. App., 16a-17a). By orders of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including February 22, 1973. The petition for a writ of certiorari was filed on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the activities of the Federal Power Commission (1) in discharging the accounting and rate regulation responsibilities imposed upon it by the Natural Gas Act over pipeline companies selling natural gas for resale in interstate commerce and (2) in processing applications of producers of natural gas for authorization to sell gas to such pipeline companies result in "things of value or utility" to such pipeline companies [1] within Title V of the Independent Office Appropriations Act, 1952, so as to authorize the Commission to recover the costs incurred by it in discharg-

[1] Petitioner would also bring before the Court a comparable question with regard to certain annual charges which the Commission undertook to assess against electric utilities subject to regulation under the Federal Power Act, 16 U.S.C. 791, *et seq.* This question is treated in the separate brief in opposition being filed by New England Power Company.

ing these responsibilities through the assessment of annual charges against the pipeline companies.[2]

STATUTE INVOLVED

The provisions of Title V of the Independent Office Appropriations Act of 1952 are set out in the Petition at pp. 2-3.

STATEMENT OF FACTS

By Notice of Proposed Rulemaking issued November 5, 1970 (J.A. 1-16)[3] the Federal Power Commission (Commission) proposed to assess a "general annual charge" against all natural gas pipeline companies with annual gas operating revenues in excess of $1,000,000 subject to its jurisdiction under the Natural Gas Act.[4] This charge was designed to reimburse the Commission for its costs in regulating pipeline rates under that Act. The amount of the charges to be assessed each year against each pipeline company was to be determined by subtracting the amounts collected by the Commission in filing fees specified in a separate schedule[5] from the Commission's total costs of admin-

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[2] The question as stated in the Commission's petition (at p. 2) assumes that these Commission activities result in specific benefits to the pipeline companies within Title V. As indicated in the Question Presented set out in the text, that assumption is improper since it assumes the answer to the actual question involved.

[3] "J. A." refers to the Joint Appendix printed in the court of appeals.

[4] Respondent, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. is a natural gas pipeline company subject to Commission regulation under the Natural Gas Act and has the requisite revenues.

[5] The Commission had earlier prescribed a specific schedule of fees in connection with the filing by pipelines of applications for various licenses, permits and sanctions required under the Natural

istering its natural gas pipeline programs under the Natural Gas Act in that year, and assessing the remainder among the pipeline companies in proportion to their total deliveries of natural gas in interstate commerce in that year.

By this Notice, the Commission also proposed to assess an "added reserve fee" against each pipeline company which was "required to file an Annual Report—Total Gas Supply on FPC Form No. 15" (J.A. p. 16) This fee was to be based on "one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form." (J.A. p. 16) and purportedly was designed to recover the Commission's costs of processing applications filed by producers of natural gas for authority to sell gas to the pipeline companies (J. A. pp. 5-6).

Citing Title V of the Independent Offices Appropriations Act, 1952 (Pet. pp. 2-3) and Bureau of the Budget Circular A-25 (Pet. App. pp. 61a-62a) [6] as authority for these proposed charges, the Commission's Notice explained its reasoning underlying the proposed general annual charge as follows (J. A. p. 5):

Gas Act. (See Sections 159.1 and 159.2 of the Commission's Regulations Under the Natural Gas Act, originally adopted by Order 317 issued on January 5, 1966, 35 F.P.C. 30, 392, (1966). Its Notice of Proposed Rulemaking also proposed to increase these fees (See J.A. pp. 14-15). There is no question here as to the validity of these fees either as originally adopted or as here increased by the Commission.

[6] Circular A-25 is dated September 23, 1959 and was issued by the Bureau of the Budget pursuant to Title V's directive that steps be taken to assure that the fees assessed under that Title by the various Government agencies "be as uniform as practicable and subject to such policies as the President may prescribe."

> "The * * * costs [remaining after deduction of the filing fees] of carrying out the functions of our pipeline programs have not heretofore been made subject to any charges. In the main, those functions relate to our activities in passing upon pipeline rate filings.[7]

Following the submission of written comments by interested industry associations and companies, including Tennessee, the Commission on March 18, 1971, issued Order No. 427 adopting the proposed annual charges with several modifications not now relevant.[8] Holding that the assessment of the general annual charge came within its authority under Title V of the 1952 Appropriations Act and the criteria provided in Circular A-25, the Commission stated (Pet. App., pp. 30a-31a):

> "We recognize that the exercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or

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[7] With regard to the "added reserves fee", the Commission observed (J. A. p. 5):

> "We also propose to adopt a fee schedule which will return to the Treasury the costs of the producer certificate program based upon the annual commitments of new reserves to the pipelines for interstate deliveries. For reasons of administrative convenience these charges would be paid by the pipelines on the basis of new reserves reported as certificated during each reporting period."

[8] Among these changes was a change in the basis for determining each pipeline's share of the total to be recouped by the general annual charge. Whereas the Commission originally proposed the allocation to be on the basis of each company's total interstate deliveries, the Commission now proposed to make the allocation on the basis of each company's total jurisdictional deliveries. This change had the effect of unreasonably and arbitrarily imposing a greater proportion of these costs upon these pipelines, such as Tennessee, the bulk of whose natural gas pipeline business is for resale rather than for direct use or consumption.

> preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands."

Thereafter, applications for rehearing were filed (J. A. 120-126, 132-136), pointing out, *inter alia*, that in a earlier proceeding fixing a schedule of pipeline application fees, the Commission had acknowledged that it lacked authority to prescribe annual charges designed to recover the annual costs of pipeline rate regulation, since "these activities are primarily for the benefit of the general public rather than the regulated companies" (See J.A. p. 121; see also 30 Fed. Reg. 12077). However, in its order denying rehearing issued May 14, 1971 (Pet. App. 51a-60a), the Commission dismissed this statement as dictum and held instead that its authority under Title V to assess fees extended to the assessment of the proposed general annual charges since they are

> "* * * predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress which in our opinion satisfy the statutory requirements for the imposition of these charges." (Pet. App. p. 57a) [9]

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[9] Continuing, the Commission reaffirmed its assessment of the "added reserve fee" against the pipelines stating (Pet. App. p. 57a):

> "The assessment is limited to only one of the various producer programs: the certification of producer sales which plainly

On appeal, the court of appeals set aside both general annual charges and the added reserve fees. The court pointed out that the Commission's accounting and rate regulation of natural gas pipelines

> "* * * was primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held (fn. omitted). There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefiting the general public should come from the general fund of the treasury." (Pet. App. pp. 9a-10a).

Further, the court noted that the Commission's claim that the pipelines had benefited within Circular A-25 by virtue of the creation of a favorable "economic climate"

> "* * * missed the point. The creation of an 'economic climate' is not a special service nor is a particular pipeline or gas company the 'special beneficiary' of such a climate any more than any other pipeline, gas company or *the consumer in general.*" (Pet. App. 9a) [10]

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benefit pipelines through the Commission's control of the initial prices they are required to pay producers for gas purchases. The Commission's activities in this connection which provide clear benefits to pipelines through regulatory action include the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines."

[10] Emphasis supplied throughout unless otherwise noted.

ARGUMENT

Since, as this Court has repeatedly held, the primary purpose of the Natural Gas Act is to protect the ultimate consumers from being charged excessive rates by the pipeline companies, the Commission's discharge of these responsibilities patently does not result in "things of value or utility" within Title V of the 1952 Appropriation Act to the pipelines so regulated, either individually, or collectively as the pipeline industry. Accordingly, the court of appeals was clearly correct in holding that the Commission had no authority under Title V to seek to recover from the pipelines the costs incurred by it in discharging these responsibilities. Moreover, since this holding is limited to the specific Power Commission charges involved in this proceeding, the judgment of the court of appeals does not raise a question of general importance and does not conflict with that of the Fifth Circuit, sustaining certain fees imposed by the Federal Communications Commission, in *Clay Broadcasting Corp.* v. *U.S.*, 464 F.2d 1313, pending on petition for a writ of certiorari, *sub nom, National Cable Television Assn.* v. *U.S.*, No. 72-948.

1. It has long been settled, and, repeatedly reaffirmed by this Court, that Congress imposed upon the FPC the responsibility of "passing upon pipeline rate filings" (*supra* p. 5; J.A. p. 5) in order to protect the ultimate consumers against excessive rates. See, *e.g.*, *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954); *Atlantic Refining Co.* v. *New York Public Service Commission*, 360 U.S. 137 (1960); *Permian Basin Area Rate Cases* 390 U.S. 747 (1968). Thus, in *Hope*, the Court expressly pointed out that Congress had addressed the Natural Gas Act to "specific evils"

disclosed by the Federal Trade Commission investigation (320 U.S. at 610);[11] ruled that "the fixing of 'just and reasonable' rates (§ 4) with the powers attendant thereto (fn. omitted) was the heart of the new regulatory system." (*Id.* at 611); and concluded that "those provisions were plainly designed to protect the consumer interests against exploitation at the hand of private natural gas companies" (*Id.* at 612).

In claiming that Title V authorizes it to assess the costs incurred in discharging these responsibilities against the pipeline companies subject to such regulation,[12] the FPC apparently would read into Title V a general authorization to recover its costs of administration against the companies subject to its regulation. To be sure, there are statutes authorizing the assessment of such charges. For example, Section 10(e) of Part I of the Federal Power Act, 16 U.S.C. 803(e) expressly authorizes the Commission to require licensees under that Act to "pay * * * reasonable annual charges * * * for the purpose of reimbursing the United States for the costs of administration of this Part * * *" Similarly, several state legislatures have authorized their local regulatory agencies to assess against the companies subject to their regulation the costs of administration either on a fixed-fee basis for

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[11] Among the "specific evils" there noted was that "state commissions found it difficult or impossible to discover what it cost interstate pipe line companies to deliver gas within the consuming state; and thus they were thwarted in local regulation." (See 320 U.S. at 610)

[12] The Commission apparently has abandoned its claim, asserted in the court of appeals, that Section 16 of the Natural Gas Act also provided the requisite authority (See Pet. App., pp. 11a-13a).

specific services or as a percentage of some measure of size or value.[13]

However, Title V patently does not extend to the assessment of such general costs of administration. To the contrary, Title V, on its face, authorizes the assessment of fees only when the government agency involved furnishes something specific and identifiable, *i.e.*, "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit certificate, registration or similar thing of value or utility" to a specific identifiable beneficiary as distinguished from the public generally.

That the fees authorized by Title V were intended to be so limited is clear from its legislative history. Thus, the House Appropriations Committee explained that it was recommending the proposed legislation because "the government is not receiving full return from *many of the services which it renders to special beneficiaries.*" H. Rep. No. 384, 82nd Cong., 1st Sess., p. 2 (1951); see also, S. Rep. No. 2120, 81st Cong., 2nd Sess. (1950). Congressman Yates, a Committee member, elaborated on the House floor (97 Cong. Rec. 4809 (1951)):

> "The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses,

[13] See compilation in Committee Print entitled, *State Utility Commissions*, Subcommittee on Intergovernmental Relations of the Senate Committee on Operations, 90th Cong., 1st Sess., p. 22. See also *Memphis Natural Gas Company* v. *McCanless*, 183 Tenn. 635, 194 S.W. 2d 476, 481-482 (1946), appeal dismissed, 329 U.S. 670 (1946); *Fort Smith Gas Company* v. *Wiseman*, 189 Ark. 675, 74 S.W. 2d 788, 790 (1934).

> franchises, and certificates. * * * That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. * * * The companies pay nothing other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay some of the costs of the hearings. * * * Such companies should assume a greater share of the cost because regulation is necessary."

Likewise, the Bureau of the Budget, in its Circular A-25 has taken a similarly limited view as to the charges authorized by Title V. As a result, the assessment of the proposed general annual charges here involved clearly is at odds with the provisions of that Circular. Thus, these charges do not come within the Circular's statement of General Policy, providing that fees may be charged "to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit" (Pet. App. p. 61a). Nor does the Commission's rate regulation activities provide "special benefits" to the pipelines "above and beyond those which accrue to the public at large." (*Ibid*). The absence of any such "special benefits" is highlighted by the fact that the sole criterion for collecting the charge from a pipeline in any year is that its revenues in that year exceed the prescribed minimum without regard to whether the pipeline itself was involved in any Commission proceeding in that year.

The assessment of such costs against the pipelines violates the subparagraph (2) of Circular A-25, prohibiting the assessment of charges "for service when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefiting broadly the general public * * *" (Pet. App. 62a). As already indicated the principal, if not the sole, identifiable beneficiaries from the Commission's discharge of its rate regulation responsibilities are the consuming public generally.

There is no merit in the Commission's claim (Pet. pp. 9-10), that the proposed general annual charges are authorized under Circular A-25 because, although its rate regulation benefits the consuming public, it also

> "* * * redounded to the benefit of [the natural gas] industr[y] by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands."

To be sure, Circular A-25 refers to "business stability", but it is in the context of specific agency actions directed to identifiable beneficiaries "(*e.g.* certificate of necessity and convenience for airline routes or safety inspection of craft)" (See Pet. App. pp. 61a-62a). The Commission order here involved also contains a schedule of fees to be paid in connection with requests for comparable Commission actions (*i.e.* applications for certification of public convenience and necessity under the Act) and there is no question here as to the validity of these fees.

In contrast, the alleged beneficial "economic climate"[14] was not the result of specific actions taken by the Commission with that objective in mind as contemplated by Circular A-25. Rather, that "climate" at best came about as the culmination of the Commission's activities over a period of years and resulted from the reaction of the financial community to the Commission's discharge generally of the responsibilities imposed on it by the Congress. Moreover, even if the Commission rate regulation has been beneficial generally to the natural-gas pipelines, the pipelines have not been "special", or even the primary, beneficiaries of that regulation. In light of the primary thrust of the statute, any benefits to the natural-gas pipelines would at most be incidental by-products of the Commission's discharge of its responsibilities to the consuming public.[15]

Finally, no special benefits resulted to the pipelines justifying the Commission's assessment of the

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[14] The finding of such beneficial "economic climate" is itself questionable since it is based solely upon a report issued by the Commission in 1950, more than 20 years ago (See Pet. App. 30a-31a, fn. 5).

[15] The recent urgings of the Appropriations Committees of Congress, that the regulatory agencies, including the FPC, review and increase their fees to offset in part increased operating costs (See Pet. pp. 6-7) obviously does not serve to enlarge the Commission's authority under Title V, in the absence of any affirmative Congressional action *Cf. U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) and cases there cited. In any case, the Committees' urgings were directed not to the assessment of charges such as the general annual charges here involved, but rather, to the increasing of fees for "services * * * rendered to special beneficiaries" and "beneficial certificates and privileges granted" See *e.g.*, H. Rep. No. 1348, 90th, 2nd Sess. p. 4; S. Rep. No. 1375, 90th Cong., 2d Sess. p. 3.

added reserve fee.[16] To the contrary, each of the "benefits" allegedly accruing to the pipelines as a result of the Commission's producer certificate activities is in fact intended to benefit the consuming public rather than the pipeline industry. Under the cost-of-service method used by the Commission in fixing pipeline rates subject to its jurisdiction (*cf. e.g., F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1955)), pipelines are required to pass on, rather than retain for themselves, the benefits which the Commission (Pet. App. 57a) claims results from its regulation of "initial prices [the pipelines] are required to pay producers for gas purchases," and "the elimination of indefinite price escalation provisions."

The further "benefits" allegedly stemming from "the [Commission] issuance of temporary certificates to expedite deliveries, * * * and the [Commission] control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines," (Pet. App. 57a) are also tied in with and are a part of benefits which those Commission activities are intended to provide the consuming public. The basic purpose of this facet of the Commission activities is to assure that gas will be available to satisfy the requirements of the consuming public generally. *Cf. F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S., 621 (1972). Whatever benefits result to pipeline industry from these Commission activities are merely incidental by-products and fall far short of constituting "spe-

[16] The "administrative convenience" justification set forth in the Commission's Notice of Rulemaking (J. A. p. 5), obviously is not an adequate basis for assessing the added reserves fee against the pipelines rather than the producers.

cial benefits above and beyond those which apply to the public at large" within Circular A-25.

2. There is no conflict between the holding of the Court below and that of the Fifth Circuit in *Clay Broadcasting Corp.* v. *United States, supra.* To the contrary, both the Court below and the Fifth Circuit were in full agreement as to the need of special benefits to identifiable beneficiaries as a prerequisite to the assessment of any fees or charges, annual or otherwise, under Title V. Compare Pet. App. 5a-7a with Pet. App. 78a-81a. The Commission implicitly admits such to be the case but claims that the difference in a result reached by the two courts is attributable to "the approaches of the two courts in applying Title V [which] are diametrically opposed." (Pet. p. 16)

In so urging, the Commission would read the opinion of the Court below as setting the annual charges aside on the ground that the Commission's rate regulation resulted only in industry wide, rather than individual pipeline, benefits, whereas, according to the Commission, the Fifth Circuit held that industry-wide benefits were sufficient to satisfy Title V (Pet. p. 16).[17] But this alleged "difference in approach" does not exist; the distinction here pressed by the Government in fact did not constitute any part of the judgment or holding of either court of appeals.

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[17] But see the FCC's Brief in Opposition in No. 72-948 (at p. 10):

> "As the court stated, the inquiry under [Title V] is not whether those regulated agree with the regulators, but rather 'whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission' (Pet. App. A-18)."

The Court's ruling here was simply that the primary beneficiaries of the Commission's accounting and rate regulatory activities were the consuming public, and hence that the natural gas pipelines, neither individually nor collectively as an industry, received the "special benefits" required by Title V to justify the imposition of the proposed annual charges (Pet. pp. 9a-10a):

> "In sum, we conclude that the regulation of these industries is primarily for the benefit of the public * * *. There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public."

This approach is not opposed, diametrically or otherwise, to that of the Fifth Circuit. Like that of the Court below, the Fifth Circuit's holding was in no way predicated by any distinction between industry v. individual company benefits. Moreover, the nature of the FPC's rate regulation of the pipeline industry differ so markedly from the FCC's regulation of the broadcast and CATV industries as to make not only "detailed comparison of the [alleged] respective benefits bestowed by the different regulatory agencies difficult" as the FPC admits (Pet. p. 16), but also to make the different results reached by the two courts wholly consistent with each other.

Unlike the FPC's annual general charge have involved which, as shown earlier, is intended to cover its costs of rate regulation directed at protecting the ultimate consumers against excessive rates, the FCC annual charges involved in *Clay Broadcasting* are unrelated to any rate regulatory responsibilities the FCC may have under the Federal Communications Act. See Amendment of Subpart G of Part 1 of the FCC relat-

ing to Schedule of Fees, FCC Docket No. 18802, 23 FCC 2d 880 (1970), 28 FCC 2d 139, (1971). Indeed, since CATV is not "common carrier" under Title II of the Communications Act (*U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, 172 (1968)), CATV operators apparently are "free to set their own advertising rates" *Cf. U.S.* v. *RCA*, 358 U.S. 334, 349 (1959).

Furthermore, one of the primary purposes of FCC regulation of broadcasting and CATV activities is to allocate the limited air waves and broadcast spectrum among the various applicants for license and to protect those having such licenses from interference by others. See *e.g.*, 23 F.C.C.2d at 890, 897-898, 28 F.C.C. 2d pp. 142-143, 150-151. Although the FCC's guideline in so acting is the "public interest", the Government (Pet. pp. 15-16; see also Br. in Opp. in No. 72-948 at pp. 7-8) urges that the Fifth Circuit properly held that such FCC regulation is highly and directly beneficial to broadcasters and CATV systems:

> "* * * Broadcasters receive the right to operate on a portion of the public's electromagnetic spectrum, are protected against technical interference and are part of a FCC controlled market structure which permits them to operate at a profit (App. G, *infra*, p. 70a). CATV operators, of course, use the broadcast signals protected and licensed by the FCC and the relative scarcity of television outlets creates much of the economic value of CATV systems; the systems are also benefited by FCC rules restricting the ownership of CATV systems by television stations and networks and stand to benefit from proposed rules which would limit the amount of franchise fees which local governments could charge CATV operators (*Id.* at 78a-79a)."

Since these valuable benefits are continuing in nature, the assessment of an annual charge, such as that assessed by the FCC upon CATV operators on the basis of the number of their subscribers, plainly is so different from the FPC's general annual charge intended to recover its rate regulation costs as to render the result reached by the Court below not inconsistent with that of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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